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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

The Provision of Interstate
and International Interexchange
Telecommunications Service Via
the "Internet" by Non-Tariffed,
Uncertified Entities

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RM No. 8775

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OPPOSITION OF COMPUSERVE INCORPORATED

COMPUSERVE INCORPORATED

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SUMMARY

ACTA requests that the Commission initiate a rulemaking "to regulate the Internet" and, in particular, to regulate software products that provide the capability to conduct voice communications over the Internet. CompuServe Incorporated opposes ACTA's Petition on procedural, statutory and public policy grounds.

First, ACTA's Petition does not comply with the Commission's procedural requirements. ACTA, for example, fails to comply with Section 1.401(c) of the Commission's regulations which requires a petitioner seeking the issuance of a rule to set forth the text or substance of the proposed rule. Because ACTA has failed to identify the scope of the regulation it proposes (for example, whether it proposes that software manufacturers worldwide be required to obtain FCC permission before they introduce new Internet computer processing applications or products), the Commission does not have a basis even to consider instituting a rulemaking.

Second, ACTA fails even to attempt to show how the Internet voice capability software products at issue fit within the new framework established by the 1996 Telecommunications Act. Analysis of the new statutory definitions shows that the software providers are engaged in neither "telecommunications" nor the provision of "telecommunications services" for a fee and, therefore, that the Commission lacks authority to regulate them under Title II of the Communications Act. Indeed, Congress made clear in the 1996 Act that the Internet is to remain unregulated, declaring it to be "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. . . ." ACTA also fails to address the fact that Internet voice capability essentially is an advanced form of storage and retrieval service using protocol processing capabilities. As such, it is an unregulated enhanced service within the meaning of the Commission's rules.

Third, even if there were such a thing as Internet "telecommunications services" -- which there is not -- tariff and Section 214 regulation of such services would be impossible from a practical standpoint. Charging for Internet voice capability on a time-sensitive basis is practically impossible because Internet access providers currently have no available means to distinguish and measure Internet usage for voice applications in

contrast to Internet usage for non-voice applications. Providers typically offer a package of services for a bundled price, and voice services are not priced separately. Charging for Internet voice capability on a distance-sensitive basis also is impractical because Internet services effectively are location-indifferent; the Internet does not specify addresses by NPA or NXX. Moreover, even if possible, developing a method to charge for Internet voice usage on a time and/or distance-sensitive basis would require the expenditure of a tremendous amount of resources which would drive up the prices for online services and decrease customer satisfaction.

Finally, grant of the ACTA Petition also would be inconsistent with sound public policy. Today, the Internet is operated as an unregulated, non-governmental, self-administered network of thousands of interconnected server computers which provides Internet users worldwide access to stored information and allows them to perform a continually expanding variety of computer-based applications. The free flow of various types of information, the endless stream of innovations, and the vitality which currently characterize the Internet likely will come to a halt, however, if the Commission were to "regulate the Internet" as requested by ACTA. The Commission correctly decided over a decade ago in the Computer II proceeding that the mere potential threat of regulation would stifle the development and widespread availability of enhanced services like those provided via the Internet. The public interest would not be served if the government were to supplant consumers in the role of picking marketplace winners and losers. Moreover, any Commission attempt to regulate the Internet may be seen as precedent by the States and by foreign administrations to do likewise. This would exacerbate the adverse effects of any FCC regulation and would be directly contrary to the FCC's efforts over the last fifteen years to prevent the States and foreign administrations from regulating enhanced services.

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OPPOSITION OF COMPUSEVE INCORPORATED

CompuServe Incorporated ("CompuServe"), by its attorneys, hereby files its opposition to the Petition For Declaratory Ruling, Special Relief, and Institution of Rulemaking (Petition) filed by America's Carriers Telecommunication Association ("ACTA") on March 4, 1996, in which ACTA seeks, principally, to regulate Internet software that enables voice capability.

CompuServe operates the most comprehensive online value-added network in the world, providing a variety of enhanced online information and database services to more than 4.7 million members in 147 countries. In addition to the many online information services CompuServe provides its members, CompuServe provides access to the Internet, both as a stand-alone service and as part of its proprietary offerings. For example, through its recently introduced WOW! from CompuServe™ proprietary family-oriented service CompuServe will provide subscribers unlimited access to the Internet for a flat monthly charge of \$17.95 per

month. CompuServe also makes available to its members VocalTec's Internet Phone™ software products which enable users connected to the Internet to conduct two-way voice conversations using their personal computers and compatible microphones, headsets, and/or speakers.

CompuServe opposes ACTA's Petition on procedural, statutory and public policy grounds.

I. ACTA'S PETITION

ACTA, a trade association representing certain interexchange telecommunications companies, states that its members generally are subject to federal and state regulation in their for-profit provision of basic telecommunication services to the public. ACTA's Petition purports to address the perceived competitive threat experienced by its members from the companies that produce computer software products that enable a computer with Internet access specially configured with microphones and either headsets or speakers to be used to conduct voice conversations. Petition at i. ACTA states that Internet users typically are not charged for Internet voice capability on a usage basis other than the purchase price of the specialized computer software product, the additional hardware and the cost of their Internet access connections. Id. at i and 3.

ACTA names five software providers/products, including VocalTec, which are the focus of its Petition and claims, without explanation, that "the providers of this software are

telecommunications carriers and, as such, should be subject to FCC regulation like all telecommunications carriers." Id. at 10 and i. ACTA also claims that "the FCC has the authority to regulate the Internet." Petition at i. ACTA requests that the Commission:

issue a declaratory order establishing its authority over interstate and international telecommunications services using the Internet; grant special relief to maintain the status quo by immediately stop the sale of this software [sic]; and institute rulemaking proceedings defining permissible communications over the Internet.

Petition at 11. CompuServe opposes each of ACTA's requests.

II. ACTA'S PETITION IS PROCEDURALLY DEFECTIVE

The Commission should dismiss ACTA's Petition as procedurally defective. ACTA fails to comply with Section 1.401(c) of the Commission's rules, 47 C.F.R. §1.401(c), which requires a petition seeking the issuance of a rule or regulation to set forth the text or substance of the proposed rule or regulation. Nowhere in the Petition does ACTA specify which type or types of computer applications using the Internet it proposes should be regulated or the scope of such regulation. Nor does ACTA explain whether it proposes that software manufacturers be required to obtain FCC permission before they introduce new Internet computer processing applications or products.

The purpose of Section 1.401(c) is to require specificity from the petitioner so that the Commission and the interested public can determine the breadth of the proposed

regulation. ACTA's failure to set forth its proposed rule is particularly egregious in this context because the Internet is accessed by governmental bodies, academic institutions, businesses and individuals for a multitude of varied purposes, functions, and activities and under varied operational circumstances. Without rudimentary and specific information on the breadth of ACTA's proposed regulation of the Internet, the Commission does not have a basis even to consider instituting a rulemaking.

ACTA's Petition also fails to meet the criteria for declaratory rulings, which are to be issued to "terminat[e] a controversy or remov[e] uncertainty." 47 C.F.R. §1.2. ACTA's Petition seeks only to create controversy and uncertainty where none exists today. For example, end users, especially those needing to call 911 or a family member in an emergency, do not confuse Internet voice capability with regulated basic telephone transmission services. From the end user's perspective, those different voice capabilities clearly are not "functionally equivalent" within the meaning of longstanding court and Commission precedent. See Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 796 (D.C. Cir. 1982).

ACTA also apparently ignores the fact that to be considered lawful a Commission regulation must be directed at

protecting or promoting a statutory purpose.^{1/} If, as in this case, a problem relevant to its statutory mandate does not exist, the courts have held that the Commission should not regulate at all. See Home Box Office v. FCC, 567 F.2d 9, 26-43 (D.C. Cir.), cert. denied 434 U.S. 829 (1977). See also City of Chicago v. Federal Power Commission, 458 F.2d 731, 742 (D.C. Cir. 1971), cert. denied 405 U.S. 1074 (1972) ("regulation perfectly reasonable and appropriate in the face of a given problem [is] highly capricious if that problem does not exist").

Finally, ACTA fails to show that the Commission has statutory authority to grant the special relief ACTA requests. The Commission has stated that requests for relief which "would clearly be impossible or impracticable to grant" should be dismissed. See Amendments of Part 0 and Part 1, 79 F.C.C. 2d 1, 3 (1980). ACTA does not explain under what authority the Commission could prohibit the sale, or regulate the distribution, of computer software products.

^{1/} See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77.F.C.C. 2d 384, 433 (1980), recon., 84 F.C.C. 2d 50 (1981), further recon., 88 F.C.C. 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), aff'd on second further recon., 56 Rad. Reg. 2d (P&F) 301 (1984).

III. PROVIDERS OF INTERNET VOICE AND AUDIO COMMUNICATIONS SOFTWARE ARE NOT TELECOMMUNICATIONS CARRIERS AND, THUS, ARE NOT SUBJECT TO TITLE II TARIFFING AND CERTIFICATION REQUIREMENTS.

Although ACTA cites the recently enacted statutory definitions of "telecommunications", "telecommunications carrier" and "telecommunications service," ACTA does not even attempt to show how the computer software products at issue fit within these definitions. Petition at 6-7. ACTA's petition should be dismissed for this reason alone because ACTA bears the burden of demonstrating whether the software products at issue fall within the Commission's jurisdiction.

In fact, examination of the new statutory provisions demonstrates that the computer software products at issue do not fit within the statutory definitional framework. Section 3 of the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 60 (1996), defines telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," (to be codified at 47 U.S.C. §153(48)) (emphasis supplied). To state the obvious, the named software providers sell computer software products. They do not provide any transmission services, and, thus, do not provide "telecommunications."

Section 3 of the 1996 Act further defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be

effectively available to the public, regardless of the facilities used," (to be codified at 47 U.S.C. §153(51)) (emphasis added). The activities of the software providers do not fit within this definition either. First, as stated above, the software providers do not provide transmission services at all. Second, as ACTA states in its Petition, the software providers certainly do not provide telecommunications for a fee. Petition at 3. Once the computer software product and required additional hardware is purchased and Internet access fees are paid (in many cases to an unaffiliated access provider), the providers of the software and hardware collect no additional fees for actual usage of Internet voice and audio capability. Because the named software providers are engaged in neither "telecommunications" nor the provision of "telecommunications services" for a fee, the Commission lacks authority to regulate them under Title II of the Communications Act of 1934, as amended (the "Act").

In addition to the new statutory definitions, Congress made clear elsewhere in the Act that the Internet is to remain unregulated. New Section 230 of the Communications Act of 1934, as amended, formally declares it to be "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regula-

tion. . . . "^{2/} Moreover, in new Section 223(e) Congress expressly disavows any intention "to treat interactive computer services as common carriers or as telecommunications carriers." Congress defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet. . . ."^{3/} Because grant of ACTA's requested relief would conflict directly with the Congressional policy against regulation of the Internet, the Commission should dismiss the ACTA's Petition on that ground alone.

Even if there were such a thing as Internet "telecommunications services" -- which there is not -- common carrier regulation of such services would be impossible from a practical standpoint. ACTA in effect is asking that Internet voice and audio connections be charged on a time and distance sensitive basis, the same as interexchange telephone calls transmitted through the public switched network. They cannot be.

First, Internet access providers currently have no available means to distinguish Internet usage for voice

^{2/} See Section 509 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 137 (1996) (adding new Section 230(b)(2) to the Communications Act of 1934, as amended, to be codified at 47 U.S.C. §230(b)(2)).

^{3/} Section 509 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 139 (to be codified at 47 U.S.C. §230(e)(2)).

applications from Internet usage for non-voice applications. Internet voice applications are just one of many integrated applications which almost always are made available to end users on a bundled basis at a flat rate, regardless of the voice or non-voice application utilized. Second, Internet services effectively are location-indifferent; the Internet does not specify addresses by NPA or NXX. For example, a recently proposed service would allow Internet users to receive fax and voice-mail messages at their respective electronic mail addresses anywhere in the world. Moreover, wireless Internet access services render it impossible to identify the geographic locations of end users, thereby rendering traditional tariffs and Section 214 certification requirements meaningless and unenforceable. Third, developing a method for measuring Internet voice usage on a time and distance-sensitive basis would require a tremendous amount of system, administrative and other types of resources that would be extremely costly to providers in this emerging marketplace. The expenditure of such resources would drive up the prices for online service and decrease customer satisfaction. Tariff and entry regulation of providers of Internet computer software products, therefore, not only is fruitless, but it is inconsistent with the public interest.

**IV. ACTA FAILS TO ADDRESS THE FUNDAMENTAL COMPUTER II
DISTINCTION BETWEEN REGULATED BASIC SERVICES AND UNREGULATED
ENHANCED SERVICES.**

The Telecommunications Act of 1996 does not modify the regulatory framework adopted in the 1980 Computer II proceeding in which the Commission established the distinction between regulated "basic" services and unregulated "enhanced" or information services.^{4/} The ACTA Petition does not even attempt to address the Commission's Computer II regime.

In Computer II, the Commission determined that a basic service is the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Computer II, 77 F.C.C.2d 384 at 420. Enhanced services are defined in Section 64.702(a) of the FCC's rules as:

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscribers transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

As these definitions demonstrate, the use of Internet software for voice capability is an enhanced service. Similar to

^{4/} See Computer II, 77 F.C.C.2d 384 at 420-21 (1980). Enhanced services, as that term is defined by the Commission, are basically the same as "information services" as defined in the AT&T Consent Decree. U.S. v. American Telephone & Telegraph Co., 552 F. Supp. 131, 178 n.198 (D.D.C. 1982), aff'd sub nom. Maryland v. U.S., 460 U.S. 1001 (1983). The Telecommunications Act of 1996 adopted a definition of "information services" essentially identical to the definition in the AT&T Consent Decree (to be codified at 47 U.S.C. §153(41)).

other enhanced services provisioned via the Internet, such as e-mail, it requires both the use of computer processing protocols and the use of storage and retrieval technology.^{5/}

Specifically, a consumer's use of software that enables voice capability typically establishes a session with a host or "server" computer on the Internet.^{6/} The server registers the end user as "active" (that is, able and willing to call and be called) and downloads a list of other people who are registered "active" on the server. The function of the registration server effectively is to act as a storage and forwarding mechanism. When two parties who are registered "active" decide to accept a connection, they speak into microphones, and their analog voice signals are converted by a sound card into digital samples of the audio data. Small samples of the digital audio data are stored in a buffer while they are processed by compression software. After the voice signal is digitally compressed, the data are retrieved in near real-time by the other party and converted back into an analog voice signal.

ACTA has not even purported to show that voice capability on the Internet, like other applications of the

^{5/} The Commission expressly found that data storage and retrieval applications similar to e-mail are considered enhanced services rather than basic pipeline transmission services. Computer II, 77 F.C.C.2d at 420-21.

^{6/} Proprietary online services and Internet access services typically are provided on a client-server model under which end user clients are afforded remote access through their computer terminals to information and computer processing applications stored in host or "server" computers.

Internet which incorporate protocol processing capabilities, is anything but an advanced form of storage and retrieval service using protocol processing capabilities. As such, it is an enhanced service excluded from Title II regulation.

V. COMMISSION REGULATION OF THE INTERNET NOT ONLY IS OUTSIDE THE COMMISSION'S STATUTORY AUTHORITY BUT WOULD CONSTITUTE UNWISE PUBLIC POLICY THAT WOULD STIFLE FURTHER INNOVATIONS

ACTA claims that the public interest would be served by Commission regulation of the Internet through "allocating finite communications resources/frequencies and organizing communications traffic . . . [and] defin[ing] the type of permissible communications which may be effected over the Internet." Petition at 5. Although the Commission should dismiss the ACTA Petition summarily on both procedural and substantive statutory grounds, to the extent the Commission chooses to address ACTA's public interest argument it should state in no uncertain terms its intention not to regulate the Internet.

The Internet is a "network" of multiple, independently owned and operated interconnected computer networks that has been created through the voluntary cooperation of independent owners of hundreds of server computers. By some estimates, 46,000 computer networks, 3.2 million host computers and 30 million people in 146 countries comprise the Internet -- and it continues

to grow tremendously each year.^{7/} The Internet is operated as an unregulated, non-governmental, self-administered network of server computers, each of which is individually programmed to interact with other servers using a set of communications protocols and computer processing applications that allow for the exchange of information among computers. The use of these protocols and computer processing applications allows users of the Internet to perform a wide variety of tasks, such as accessing or storing information and exchanging e-mail, video and audio, or other data files.

The free flow of various types of information, the endless stream of innovations, and the vitality which currently characterize the Internet likely will come to a halt, if the Commission were to adopt ACTA's proposal and seek to begin "allocating finite [Internet] communications resources/frequencies and organizing [Internet] communications traffic." The long-standing distinction discussed in the preceding section between unregulated enhanced services and regulated basic pipeline transmission services was established by the Commission in large part because it was recognized that the mere potential threat of regulation would stifle the development and widespread availability of enhanced services like those provided via the Internet. Computer II, 77 F.C.C.2d at 428. The Commission

^{7/} Testimony of Stephen M. Heaton, General Counsel and Secretary, CompuServe Incorporated, before the Committee on Courts and Intellectual Property of the House Committee on the Judiciary, Hearings on H.R. 2441, February 8, 1996.

concluded that not regulating enhanced services would promote the public interest by allowing them to flourish as providers sought to meet consumer demands in a competitive marketplace. Id. at 430.

Experience has demonstrated the wisdom of the Commission's policy not to regulate enhanced services employing computer processing applications such as those used on the Internet. Congress itself expressly recognized that it is the unregulated status of the Internet which has led to the array of new interactive services and applications which are now flourishing.^{8/} The past few months alone have witnessed a veritable explosion of new Internet-related enhanced services and applications. Moreover, the price of Internet access services is plummeting with the introduction of Internet access services from hundreds of new providers, ranging from established companies such as AT&T, MCI, MicroSoft and Bell Atlantic to new entrants whose names were virtually unknown a few years ago but now are major industry players. An extremely competitive marketplace has developed in which Internet providers are driven to serve end user customers in new ways and respond to their demands.

A Commission attempt to regulate the Internet will have an adverse effect on the many innovative new service offerings, strategic business partnerships, and pricing reductions which are

^{8/} See Section 509 of the Telecommunications Act of 1996 (adding new Section 230(a)(1) to the Communications Act of 1934, as amended).

being introduced practically every day. Regulation will stifle the Internet's current dynamism as the government will supplant consumers in the role of picking marketplace winners and losers. Resources will be diverted from the industry's current efforts to serve customers and instead will be devoted to attempts either to circumvent regulators or to co-opt them in order to establish regulatory barriers to further competition.

The harm done by FCC regulation will not be limited to applications performed on the Internet on an interstate basis. The Internet, of course, is not limited to interstate applications but can be used for what are arguably "intrastate" and "international" applications as well.^{9/} Any attempt by the Commission to regulate the Internet may be seen as precedent by the States and by foreign administrations to do likewise, thereby exacerbating the adverse effects of any FCC regulation. A Commission attempt to subject "the Internet" to regulation also would be completely inconsistent with the U.S. government's long-standing position that international enhanced services should be provided only on an open, unregulated basis. Other countries may be tempted to follow the U.S. lead and regulate international

^{9/} As pointed out above, online and Internet service providers do not presently have the capability to track origination and destination locations for purposes of jurisdictional determination. Even if this were possible, a tremendous expenditure of system, administrative and other resources would be required to implement new systems that would permit such tracking for jurisdictional purposes.

services the U.S. previously has classified as enhanced, even if such enhanced services are not provided via the Internet.

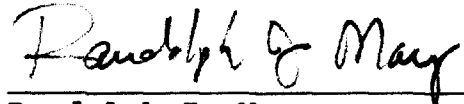
Finally, the ever-increasing array of Internet applications and Internet access service choices belies ACTA's claim that the public interest would be served by the institution of a rulemaking to determine which "customary types of Internet traffic" need "protection" from new and innovative Internet-based functions and applications. Petition at 5. A computer application which is unheard of today can become "customary" on the Internet within a very short time, depending solely on its acceptance in the marketplace. Internet users themselves should -- and must -- decide which applications are viable on the Internet. In an arena like the Internet where the interests of end users already are paramount due to marketplace forces, it is clear that any suggestion by the Commission that it even might consider tariff and entry regulation of new Internet applications would disserve the public interest.

VI. CONCLUSION

For the foregoing reasons, CompuServe urges the Commission to dismiss summarily ACTA's Petition.

Respectfully submitted,

COMPUSERVE INCORPORATED

A handwritten signature in cursive script, reading "Randolph J. May", written over a horizontal line.

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May 8, 1996

CERTIFICATE OF SERVICE

I, Marcia Towne Devens, do hereby certify that true and correct copies of the foregoing document, "", were served by first-class U.S. Mail, postage prepaid, this 8th day of May, 1996, on the following:

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